

Served: January 23, 1992

NTSB Order No. EA-3472

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

SE-9937

GEORGE KASEOTE,

Respondent.

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins issued in this proceeding on July 25, 1989, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate on allegations that he violated section 91.75(a) of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91 by deviating from an air traffic control

¹An excerpt from the hearing transcript containing the initial decision is attached.

("ATC") clearance without obtaining a prior amended clearance.² The Administrator ordered the suspension of respondent's certificate for a period of 30 days, but waived the sanction because of respondent's timely report under the Aviation Safety Reporting Program ("ASRP"). The law judge modified the sanction to a suspension period of 15 days.

Respondent, who is represented by counsel in this appeal but who appeared pro se before the law judge, asserts that the law judge's findings of fact are unsupported by a preponderance of the evidence, and that the law judge had predetermined the facts in the case, thereby depriving him of due process. Respondent also claims that since there were no allegations of willfulness and no allegations that an unsafe condition was caused by his operation, the suspension should be set aside by the Board. The Administrator has filed a brief in reply, urging the Board to affirm the order in its entirety.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. For the

²FAR section 91.75(a) provides in pertinent part as follows:

"§91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance...."

reasons that follow, we will deny respondent's appeal.

The Administrator's order,³ which serves as the complaint in this matter, alleges, in pertinent part:

2. On September 13, 1988, you were pilot in command of an AMD Falcon 50 airplane, civil aircraft N184J, operating in air commerce under Instrument Flight Rules (IFR) near Little Rock, Arkansas.

3. During the above flight, you requested a clearance to descend to, and were cleared by Air Traffic Control (ATC) to descend to, an altitude of 15,000 feet MSL.

4. At a time when no emergency existed and when an amended clearance had not been obtained from ATC, instead of descending to 15,000 feet MSL as cleared, you leveled your aircraft at 17,600 feet MSL and climbed to FL 190.

By reason of the foregoing, you violated Section 91.75(a) of the Federal Aviation Regulations in that when no emergency existed, you, as pilot in command, deviated from an air traffic control clearance without obtaining a prior amended clearance.

In respondent's notice of appeal and answer to the Board, he admitted the altitude deviation but claimed that the fact that he was test-piloting an FAA-certified experimental aircraft at the time of the deviation, with the full knowledge of ATC, excuses his deviation, which was apparently caused by a problem with the aircraft's UNS-1 VNAV system's software. At the beginning of the hearing the parties agreed that the fact of the deviation was not in dispute, and a hearing on the issue of sanction alone

³As amended without objection at the hearing.

commenced. Because the facts were deemed admitted, the Administrator did not present a case in chief and the hearing began with the presentation of respondent's case.

Respondent testified that he was given an ATC clearance to descend from 35,000 feet to 15,000 feet. Respondent claims that during the high speed descent of his aircraft, the automatic pilot device malfunctioned and caused the aircraft to stop its descent at 17,600 and then gain approximately 1,400 feet. Respondent then leveled the aircraft at 19,000 and requested and received from ATC permission to maintain that altitude.

Respondent at first claimed in his testimony that this yo-yo maneuver was not a deviation from his clearance to descend to 15,000 because he had requested from ATC a block of air space from 35,000 to 15,000 and therefore the deviation took place in "his" air space. However, the air traffic controller testified in rebuttal that while respondent first requested a block of air space from 24,000 to 29,000 he then asked for a climb to 35,000 with a descent back down to 15,000. Respondent conceded on cross-examination that, had he asked ATC for a block of air space in this instance, "we wouldn't be sitting here." (TR-25)

The law judge found that the facts were uncontroverted that the deviation occurred, and that the deviation was

caused by the aircraft's autopilot.⁴ He also found that respondent and his co-pilot had spoken with air traffic control in advance and determined when the test flight could be performed with as little air traffic as possible in the area, and that air traffic was aware that respondent's aircraft was performing a test flight at the time of the deviation. While concluding that the Administrator's complaint should be affirmed, the law judge nonetheless questioned in his initial decision why, under these circumstances, a complaint had been filed. Because of what the law judge apparently deemed to be mitigating circumstances, he modified the sanction to 15 days.

We agree with the Administrator that respondent has failed to articulate in his appeal any valid basis for reversal of the initial decision. Respondent admitted the fact of the deviation in his notice of appeal, his answer, and in his testimony before the law judge. The claim that the initial decision was a "rote recapitulation of facts rather than rendition of judgment" is without merit where, as here, a respondent admits those facts which support affirmation of the Administrator's order. Moreover, respondent's claim that the law judge's remarks questioning

⁴The record supports the view that respondent could have disengaged the autopilot, in order to ensure compliance with the clearance or minimize any deviation from it, once he recognized that the aircraft had started to level off before it had reached flight level 150. See TR at 23-24.

the wisdom of the Administrator's action as evidencing some bias against respondent, is frivolous.

To the extent the law judge sought in his initial decision to modify the sanction sought by the Administrator, we reiterate our recent comments in Administrator v. Andreolas, NTSB Order No. EA-3446 (December 12, 1991) that:

[O]ur law judges should not undertake to determine what period of suspension would be appropriate for violations found proved where the Administrator has waived service of any suspension. We view such determination as gratuitous and of no precedential force or effect.⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and
2. The initial decision, to the extent that it sustains the allegation of a violation of FAR section 91.75(a), and the Administrator's order with waiver of sanction under the ASRP, are affirmed.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁵Administrator v. Friday, NTSB Order No. EA-2894 at 6, recon. denied, NTSB Order No. EA-2954 (1989).